UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

DEPARTMENT OF AMAZONAS, et al.,

Plaintiffs

v. 00 Civ. 2331 (NGG)

PHILLIP MORRIS INCORPORATED, et al.,

Defendants.

DECLARATION OF BASILE J. UDDO

I. INTRODUCTION

1. My name is Basile J. Uddo. I am over the age of twenty-one and am fully competent and able to make this declaration. The statements contained in this declaration are within my knowledge and are true and correct. I have written the entirety of this Declaration, using my own office equipment and other resources. I am fully prepared to testify to my opinions and the grounds therefor as well as all aspects of the preparation of this Declaration, should that be appropriate.

2. I submit this Declaration at the request of the law firm of Sacks and Smith,LLC, counsel for plaintiffs, Department of Amazonas, et al., in connection with defendant's motion to disqualify several law firms representing the plaintiffs. Although it is my understanding that the motion has been broadened at the last minute, I have been asked to address only two issues that were originally raised. Specifically, I have been asked to address the issues, raised by the

"Retention Agreements," that relate to "expenses of litigation" and the giving of certain assurances against improper litigation as those matters would be interpreted under Louisiana law. In summary, it is my opinion as an expert in legal ethics under the laws and rules of the State of Louisiana that neither of these issues violates standards of the Louisiana Rules of Professional Conduct or any other rules or laws under Louisiana law.

II. QUALIFICATIONS

3. I have been a member of the Bar and a practicing attorney since 1973. From 1975 until 1998, I was a full time professor of law at the Loyola University, School of Law (New Orleans). In 1998, I left my full time, full professor, tenured status to engage in other practice. Since 1998, however, I have remained as an adjunct professor of law at Loyola University, School of Law (New Orleans) and have taught the legal ethics course. During my entire tenure as a professor of law, I regularly taught and lectured on legal ethics. During my tenure as a full time professor and since, I have represented numerous individuals in the Louisiana Attorney Discipline System, consulted with numerous clients and attorneys concerning matters of legal ethics, served, on occasion, as an expert witness and continued to lecture on legal ethics and teach continuing legal education courses in that discipline.

4. I have served on committees appointed by the Louisiana Supreme Court to review and revise the Louisiana Rules of Professional Conduct. I have also been appointed on several occasions by the Louisiana Supreme Court to serve as a special disciplinary counsel to investigate and, when appropriate, prosecute discipline complaints under circumstances where the Office of Disciplinary Counsel was in a conflict position. During the mid '80s and early '90s, I served by appointment of both Presidents Reagan and Bush as a member of the National Board of Legal Services Corporation during which time I also served as a Board Liaison to the

American Bar Association for purposes of assisting in adopting and modifying legal ethics rules *vis a vis* legal services attorneys and legal services representations.

FACTS

5. For purposes of my analysis, I have been presented with certain facts that will be presented to the court and which form my conclusions and opinions with respect to the issues addressed in this Declaration. These include the retainer agreements, defense letters, and defendant's expert opinions.The most important of these facts relate to the retention agreements, a translation of which I have been presented and have reviewed.

III. ANALYSIS

6. Summary of Expert Opinion. The two issues raised by the retention agreements, i.e., the agreement to make reimbursement of expenses advanced by the attorneys contingent upon any recovery, and the commitment in the event of a counterclaim, do not violate any provisions of the Louisiana Rules of Professional Conduct or other rules or laws of the State of Louisiana. Indeed, the provision regarding expenses is precisely consistent with Louisiana Rule of Professional Conduct 1.8(e) and suggests nothing improper or unusual under the Rules of Practice of the State of Louisiana. With respect to the commitment concerning counterclaims, the agreement was nothing more than assurance that, in the course of this litigation, the attorneys will not counsel or recommend any course of conduct that would knowingly amount to defamation, libel or slander, or constitute an abuse of rights. Indeed, this assurance given by the attorneys to their clients seems to be nothing more than the assurance required by Louisiana Rule of Professional Conduct 3.1 not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so in good faith." Therefore, on their face, neither of these provisions in the retention agreement violates any provisions of the Louisiana Rules of

Professional Conduct or other rules or cases under Louisiana law. The only way that a contrary opinion can be reached under Louisiana law is if either or both of these provisions were used as improper inducement to obtain the client or generate the litigation. However, based upon evidence and information provided to declarant and which will be provided to the court, this is not the case. Accordingly, neither of these bases for disqualification of the attorneys or dismissal of the litigation has merit.

7. Making the Repayment of Expenses Contingent Upon a Monetary Recovery. The statement in the retainer agreement that "the cost shall not be paid by the client if there is no compensation of any kind" is permissible under the specific language of Louisiana Rule of Professional Conduct 1.8(e), which reads,

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) A lawyer may advance costs and expenses of litigation, **the repayment of which may be contingent on the outcome of the matter** . . . .
>
> (Emphasis added).

This rule emanates from the American Bar Association Model Rules of Professional Conduct and specifically changes the language. ABA commentary to the new Rule 1.8(e) makes very clear the intentional change intended:

> Lawyer May Advance Court Costs and Litigation Expenses. The first exception to Rule 1.8(e) permits a lawyer to advance court costs and expenses of litigation. Rule 1.8 does not require that the client guarantee repayment of the advances; repayment may be made contingent on the outcome of the matter. . . .
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> ABA Annotated Model Rules of Professional Conduct.

However, even without this change in the rule, which has been adopted by the Louisiana Supreme Court, Louisiana jurisprudence did not require that a client in all instances be ultimately responsible for advanced expenses and costs of litigation. In *Coon v. Landry*, 408 So.2d 262 (La. 1981), an attorney attempted to recover expenses from a client despite the failure to be able to execute upon a judgment obtained for the client. In ruling against the attorney, the Louisiana Supreme Court made the following statement:

> Attorneys **may** prepare contingency fee contracts that provide for reimbursement of their expenses when there is **no** recovery. Such a reduction of risks for the lawyer, however, should be reflected in the amount of the fee.
>
> 408 So.2d at 266 (emphasis added).
>
> Contingency fee contracts that provide for clients to assume costs of litigation, when there is no recovery, must be written in clear and unambiguous language leaving no doubt about their meaning. They must be fully understood by the clients upon signing.
>
> 408 So.2d at 267.
>
> Plaintiff submits that Canon 5 of the Ethical Considerations and Disciplinary Rule 5-103(B) of the Louisiana State Bar Association Code of Professional Responsibility requires the client be ultimately liable for expenses of the suit. However, the Code does not place this liability upon the client when there has been no recovery on the contingency fee contract.
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> 408 So.2d at 268.

Accordingly, even before the rule change and under the previous DR 5-103(B), the Louisiana Supreme Court not only did not require that a client ultimately be responsible for advanced expenses and costs of litigation, but would not enforce such an obligation without a clear, written statement of the obligation, demonstrably explained and understood by the client, and subject to an adjustment of the attorney's fee for the reduced risk. Therefore, the instant retainer

agreements can hardly be said to violate Louisiana law by reflecting the principals of Rule 1.8(e) and even the jurisprudence under the prior DR 5-103(B).

8. The "Commitment in Event of Counterclaim" Does Not Violate Louisiana Law. Although defendants make much of the fact that plaintiffs' attorneys have undertaken "broad insurance-like protection against incurring any financial burdens," (See, Wolfram Declaration) the reality is much different. The language of the retainer agreement, as admitted by defendants' declarants, is much narrower. Specifically, it deals fundamentally with protecting the client against some improper action. Given that there is generally no fee shifting provision for failing in a lawsuit, the only circumstances under which this provision of a retainer agreement would apply would be if there were a cost or fee assessed against the defendants for the improper conduct of attorneys or if defendant was subjected to an action for defamation, libel, slander, or for a similar charge, or for an alleged abuse of the right to sue. Given that the plaintiffs are from a foreign jurisdiction, there is nothing untoward about their concern that they are not creating unacceptable exposures by pursuing the litigation. The giving of this assurance is tantamount to the attorneys, or any attorney, saying to a client that they will not knowingly counsel or encourage conduct that is improper or could be considered defamatory, libelous or slanderous, or an abuse of the right to sue. Indeed, this is nothing more than an affirmative expression of the attorneys' obligations under Louisiana Rule 3.1 which affirmatively requires that "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so in good faith, which includes a good faith argument for an extension, modification or reversal of existing law." To suggest that such an assurance somehow rises to the level of a proprietary interest in the litigation is bemusing at best, ludicrous at worst.

Rule 1.8(j) appears under the heading of "Conflict of Interest: Prohibited Transactions." This section of the Louisiana Rules of Professional Conduct is directed toward the protection of clients against potential overreaching that could result from certain conflict arrangements. Rule 1.8 is not intended to protect defendants from otherwise proper attorney/client relationships. Therefore, the essence of the analysis as to whether or not Rule 1.8(j) has been violated is inherent in Subsection A of that rule:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client . . . .

Unless there is an ownership or proprietary interest that is **adverse to the client**, there is no violation of Rule 1.8. With respect to the latter requirement, it simply cannot be suggested that the counterclaim assurances are adverse to the client. In fact, this provision in the retainer agreement precisely aligns the interest of the clients to that of the attorneys. Given this section of the retainer agreements, the attorney and the clients have the exact same interest to avoid any actions that could be considered improper or could result in an allegation of defamation, slander or libel, or the abuse of the right to sue. There is simply no way to interpret this innocuous assurance, especially given plaintiffs' inexperience with the American legal system, as the creation of a conflict of interest otherwise prohibited by Rule 1.8(j).

With respect to the former issue concerning proprietary interests, common sense in Louisiana law would hold that the counterclaim assurance can in no sense be considered a proprietary interest. One might simply ask what is it that the attorneys "own" as a result of the counterclaim assurance given in the retainer agreement? The answer, quite simply, is nothing. The attorneys, as a result of the counterclaim assurance, do not own, possess, hold or control

anything of interest that could rise to the level of a property or proprietary or other ownership interest.

As the ABA Annotations to the Model Rules of Professional Conduct say, "the Rule 1.8(j) is intended to prevent conflicts of interest that might interfere with the lawyer's exercise of independent judgment on the client's behalf." See ABA Annotated Model Rules of Professional Conduct Rule 1.8. To hold that the counterclaim protection could interfere with the independent judgment of the lawyer would be to hold that the independent judgments of the lawyer must include improper conduct extending to defamation, libel or slander, or abuse of the right to sue. It is absurd to suggest that such could ever be the case. The essence of the proprietary interest analysis in Louisiana appears in a Louisiana Supreme Court case styled *Succession of Cloud*, 530 So.2d 1146 (La. 1988). *Cloud* was decided under DR 5-103(A), which is substantially similar to Louisiana's new Rule 1.8(j). In *Cloud*, an attorney accepted a percentage interest in a mineral royalty in exchange for assisting his client in litigating her right to the underlying mineral interest from which his royalty would arise. Clearly, this would be the kind of proprietary or ownership interest in something real, palpable, valuable and transferable that the rule seeks to prohibit. In its opinion, the Louisiana Supreme Court elucidated both the operation and the purpose of the prohibition:

> The purpose of DR 5-103(A) is to prevent a lawyer from speculating on the outcome of a lawsuit by purchasing a percentage of his client's hoped-for recovery at a discounted figure . . . . The rule was designed not only to prevent lawyers from stirring up litigation, but also to minimize the possible adverse effect of the purchase upon the lawyer's exercise of judgment on behalf of his client during litigation. If a lawyer were allowed generally to purchase a proprietary interest in his client's cause, he would first have to negotiate with the client on the amount to which the value of the claim should be discounted. Later, his judgment might be impaired by his conflicting interest in

> protecting his paid-for investment when an inadequate settlement is offered in a meritorious but close case.
>
> *Succession of Cloud*, 530 So.2d at 1149-50.

None of the elements informing the concern of the Louisiana Supreme Court in the *Cloud* case are present in the assurances against counterclaims given in the instant retainer agreements. To say in effect that the attorney assures that he/she shares the client's interest in not undertaking improper conduct that could give rise to counterclaims is far different from a lawyer purchasing an ownership interest in the subject of the client litigation at a discounted value. Accordingly, the allegation that such assurance violates Louisiana Rule 1.8(j) is wholly unpersuasive and without basis in fact or law.

IV. CONCLUSION

Based upon the foregoing, it is my opinion that the sections of the retainer agreements concerning expenses and assurances against counterclaims do not violate any provisions of the Louisiana Rules of Professional Conduct or other rules or laws of the State of Louisiana.

9. I declare that the foregoing is true and correct and given under penalty or perjury under the laws of the United States and that I executed this on the 13th day of November, 2000.

BASILE J. UDDO